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No. 85-999

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL., RESPONDENTS.

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DENNIS N. BALSKE
DEBORAH A. ELLIS
400 Washington Avenue
Montgomery, AL 36102
205/264-0286

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QUESTION PRESENTED

Whether a district court may enforce a consent decree by awarding race-conscious numerical relief when the employer has voluntarily consented to the decree, the district court has found an historical pattern of intentional racial discrimination, and the relief does not abrogate any seniority rights.

TABLE OF CONTENTS

	Page:
Constitutional and Statutory Provisions	1
Statement of the Case	
A. Preliminary Statement	3
B. Litigation History	5
C. The Enforcement Proceedings	13
Reasons for Granting the Writ	20
Conclusion	24

TABLE OF AUTHORITIES

Cases:	Pages:
EEOC v. Local 638, ... Local 28 of Sheet Metal Workers, 753 F.2d 1172 (2d Cir. 1985), cert. granted sub. nom. Local 28 of Sheet Metal Workers v. EEOC, 54 U.S.L.W. 3223 (Oct. 7, 1985) No. 1656	20, 21, 22, 24
Firefighters Local Union 1784 v. Stotts, 104 S.Ct. 2576 (1984)	18, 19
NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972) aff'd, 493 F.2d 614 (5th Cir. 1974)	7
NAACP v. Dothard, 373 F. Supp. 504 (M.D. Ala. 1974)	4
Paradise v. Prescott, 580 F. Supp. 171 (M.D. Ala. 1983)	14
Paradise v. Shoemaker, 470 F. Supp. 439 (M.D. Ala. 1979)	10, 11
United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970)	7
United States Steelworkers of America v. Weber, 443 U.S. 193 (1979)	20
Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir.), cert. granted sub. nom., Local 93 Int'l Assn. of Firefighters v. City of Cleveland, 54 U.S.L.W. 3223 (Oct. 7, 1985) No. 84-199	20, 21, 22, 24
Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3692 (March 26, 1985) No. 84-1340	21

Constitution and statutes:

U. S. Const. Amend XIV (Equal Protection Clause) 2, 19

Civil Rights Act of 1964, Tit. VII, § 706(g), 42 U.S.C. 2000e5(g) 1, 18

Miscellaneous:

Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290-38309 (1978) 12

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Respondents, Phillip Paradise, Jr., et al., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, in order that such judgment may be affirmed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 706(g) of the Civil Rights Act of 1964, as amended by the Equal Employment

Opportunity Act of 1972, 42 U.S.C. § 2000e-5(g), states in pertinent part:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate.... No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Preliminary Statement

The United States, contesting before this Court the lawfulness of an order containing numerical race-conscious relief, fails to acknowledge that the federal government supported the granting of identical relief when this case was brought almost fourteen years ago. While the position of the United States has changed during the intervening years, the need for the numerical race-conscious relief has not diminished. The Alabama Department of Public Safety's flagrant and egregious discrimination against black employees persists today, fourteen years after such conduct was first condemned.

When this lawsuit was brought in 1972, not one black trooper had been hired in the thirty-seven-year history of the Alabama Department of Public Safety, giving that agency the dubious

distinction of being the most exclusionary in Alabama state government. NAACP v. Dothard, 373 F. Supp. 504, 506 (M.D. Ala. 1974). Then Chief District Judge Frank M. Johnson, Jr., ordered that the Department hire one black trooper for each white trooper hired until approximately twenty-five percent of the force was black. More than a decade later, when the district court entered the order at issue here, the court summarized the continuing effects of the Department's unlawful conduct:

> [T]he effects of these [racially discriminatory] policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, there is still not one black. Of the 25 captains, there is still not one black. Of the 35 lieutenants, there is still not one black. Of the 65 sergeants, there is still not one black. And of the 66 corporals, only four are black. Thus, the department still operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons.

A-60.[1] (Emphasis in original.)

The United States asks for review but requests that the petition be held pending the disposition of three other pending cases. The victims in this employment discrimination lawsuit, who have won every issue below, nonetheless join with the United States in asking that this Court hear their case. However, the victims request immediate review. The victims believe the facts here so powerfully illustrate both the reality of the discrimination Title VII was designed to eliminate, and the appropriateness of the type of relief ordered, that this Court should consider this case not after but in conjunction with the pending cases involving similar issues.

B. Litigation History Prior to the Enforcement Proceedings

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[1] References to the Petition for Writ of Certiorari are cited as "Pet.___." References to the Appendix to the Petition are cited as "A-___."

The NAACP brought this case in January 1972, alleging that the Alabama Department of Public Safety ["the Department"][2] had engaged in intentional racial discrimination in refusing to hire any black troopers in its 37-year history. Soon after, the United States became a party plaintiff[3] and Phillip Paradise, Jr., ["Paradise"] intervened individually and on behalf of a similarly situated class.

After a hearing, Judge Frank M. Johnson, Jr., found that the Department had "engaged in a blatant and continuous pattern and practice" of discriminating against blacks in hiring, with respect both to state trooper positions

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[2] Throughout this litigation, the Personnel Department of the State of Alabama has also been a named defendant. The Personnel Department is responsible for developing and implementing the tests that are used to hire and promote troopers. However, the Personnel Department has never taken an active role in the litigation of the case.

[3] Although still denominated a plaintiff in recent proceedings before the district court, since 1983 the United States has vigorously opposed new numerical race-conscious relief.

and supporting personnel jobs.[4] NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974). He enjoined the Department from engaging in any employment practices, including promotion, which had the purpose or effect of discriminating on the ground of race or color. Specifically, the court ordered the Department to hire one black trooper for each white trooper hired until approximately twenty-five percent of the force was black ("1972 order").

The Department appealed to the former Fifth Circuit, alleging that the quota relief unconstitutionally discriminated against white applicants. In its appeal, the Department did not question the court's finding of blatant and continuous discrimination. 493 F.2d at 617. The Fifth Circuit affirmed the district court's order in its entirety.

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[4] With regard to supporting personnel, Judge Johnson awarded relief under the related case of United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970). The Alabama Department of Personnel is still under the court's jurisdiction in that case.

In 1974 Paradise moved for further relief on the grounds that the Department had artificially restricted the size of the trooper force in order to circumvent the 1972 order and that a disproportionate number of the blacks hired under that order had failed to achieve permanent trooper status. After a hearing was held, the court, in an unreported decision, found that the Department had indeed defied the 1972 order by "artificially restrict[ing] the size of the trooper force and the number of new troopers hired" ("1975 order"). See A-8. The evidence revealed that since the 1972 order, the Department had hired fewer troopers than it would have ordinarily hired to offset attrition, even though state officials had recognized that there was a critical shortage of troopers. The court also found that the higher attrition rate among black troopers resulted from a failure to select the best qualified blacks from the eligibility rosters; social and official discrimination against blacks at the trooper training academy;

preferential treatment of whites in some aspects of training and testing; and harsher discipline of blacks than whites for similar misconduct. As a result of these findings, the court enjoined the defendants from "delaying or frustrating the achievement of the 1972 order by artificially restricting the size of the trooper force." Id.

In September 1977, Paradise moved for supplemental relief. After each side engaged in extensive discovery, a consent decree was agreed to by all the parties and approved by the court on February 16, 1979 ("1979 decree"). A-74-82. The Department agreed that its goal was to have a racially neutral employment and promotion system and that it would not engage in any employment practice that discriminated against blacks. Specifically, the 1979 decree obligated the Department to develop within one year a procedure for promotion from trooper to corporal that would have little or no adverse impact upon blacks. The Department also agreed to begin validation of promotional procedures

for the remaining ranks in the trooper force: sergeant, lieutenant, captain, and major. In addition, the parties explicitly recognized the continuing validity of the 1972 and 1975 orders and the Department agreed that the plaintiffs could apply for an order enforcing the decree "or for any other relief which may be appropriate." A-75.

Interim procedures to be used prior to validation of the corporal promotion test were set forth in the consent decree and in a separate agreement between the parties. Pursuant to those procedures, four blacks and six whites were promoted to corporal in February 1980. As it would turn out, those four were the only black troopers promoted until after the court's December 1983 order.

Only five days after the court approved the 1979 decree, the Department filed a motion requesting that the court redefine the 25 percent quota, on the ground that "state trooper" in the 1972 order referred only to entry-level positions. Paradise v. Shoemaker,

470 F. Supp. 439 (M.D. Ala. 1979). Questioning whether such an argument "possesses the slightest patina of plausibility," 470 F. Supp. at 440-41 n.1, the court firmly rejected it and reminded the Department that under the terms of the 1972 order, the hiring goal was to remain in effect until "approximately 25% of the state trooper force is black." 470 F. Supp. at 440 (emphasis in original). The court also reiterated that defendants had been found guilty not just of excluding blacks from entry-level positions, but of operating an all-white organization. Thus, the 1972 order was "but the necessary remedy for an intolerable wrong." 470 F. Supp. at 442.

It was more than two years after agreeing to the 1979 decree, and more than a year after the date by which it had promised to produce a plan, that the Department moved on April 13, 1981, for approval of a new procedure to be used for promotions to corporal. Paradise and the United States objected to the Department's proposed procedure on the grounds that it had

not been validated in accordance with the Uniform Guidelines on Employee Selection Procedure, 43 Fed. Reg. 38290-38309, and that it would not be acceptable if it had an adverse impact on black applicants. Discovery was conducted, and then before a hearing could be held, the parties entered into a consent decree on August 18, 1981 ("1981 decree). A-65-73.

In the 1981 decree, the parties agreed that in order to establish quickly a procedure for promotion to corporal, the Department could use its proposed procedure but that the promotions based upon it would be barred if it was determined that the procedure had an adverse impact on blacks. The existence of adverse impact was to be determined under the Uniform Guidelines. If the parties could not agree among themselves whether the procedure had adverse impact, the dispute would be submitted to the court. In the 1981 decree the parties also reiterated that "it would be in the best interest of all parties to avoid unnecessary litigation and to put a selection

procedure for State Trooper Corporals in place as soon as possible." A-66.

In accordance with the 1981 decree, a written examination was administered, and in June 1982 the Department announced that it intended to make promotions from the resulting register. However, the United States objected to use of the register, because the unvalidated procedure had an adverse impact on blacks, and suggested that, pursuant to the 1981 decree, the Department formulate a proposal for making promotions in a nondiscriminatory manner as required by the 1979 and 1981 decrees. The Department did not submit any further proposal, or make any promotions, during the next nine months.

C. The Enforcement Proceedings

On April 7, 1983, Paradise moved to enforce the terms of the 1979 and 1981 decrees because the promotion procedure to be used by the defendants pursuant to the 1981 decree would have an adverse impact on black applicants. Paradise moved for a one-for-one

promotion order, reminiscent of the original hiring order, that would remain in effect only until the defendants developed and began to use a valid promotion procedure. Shortly after the motion to enforce was filed, on April 15, 1983, V. E. McClellan and three other white troopers ("McClellan") moved to intervene on behalf of a class composed of top-ranking white applicants for promotion to corporal. On October 28, 1983, the court granted intervention on a prospective basis only. Paradise v. Prescott, 580 F. Supp. 171 (M.D. Ala. 1983); see A-63 n.4. On the same day, the court found that the defendants' proposed selection procedure had an adverse impact on black candidates. After reviewing the results of the 1981 procedure, the court reflected: "Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact." 580 F. Supp. at 173. Following the provisions of the 1981 decree, the court prohibited the use of the existing promotion procedure, ordered the

Department to submit a proposed promotion plan, and stated that if the parties could not agree on a plan, the matter would be deemed submitted to the court for resolution.

On December 15, 1983, the district court issued its order and memorandum opinion requiring a temporary plan of one-for-one promotion to the rank of corporal in order to meet the Department's immediate need to promote 15 new corporals. A-55-64. The court specified that the temporary promotion order would remain in effect for each rank only until either 25% of the rank was black or until the Department developed and used a promotion procedure that did not adversely affect black candidates.[5] The court explicitly based its order on the provisions of the 1981 decree,

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[5] The court also opined that in light of the Department's longstanding failure to eradicate the continuing effects of its pervasive discrimination and to develop acceptable promotion procedures as well as in light of the severity of the existing racial imbalances, perhaps all 15 of the present corporal promotions should have been awarded to blacks. A-61.

noting that the 1981 decree required the court to fashion a procedure if the parties were unable to agree upon one.

In its opinion, the district court condemned the Department's failure to eliminate the racially discriminatory policies and practices that had been held unlawful twelve years before, and the court summarized the pervasive and manifest effects of that discrimination. The court found that the four blacks promoted to corporal under the terms of tne 1981 agreement were the only blacks in the upper ranks of the Department and that the Department was still without acceptable promotion procedures for any of its ranks. Noting that this history of obdurate conduct dramatized the fact that the effects of discrimination "will not wither away of their own accord," A-62, the court detailed why numerical relief was necessary. Absent "immediate, affirmative, race-conscious action," the court said it believed that the "egregious" and "intolerable" racial

disparities would not "dissipate within the near future." Id.

On February 6, 1984, eight black and eight white troopers were promoted to corporal pursuant to the district court's order. So far, it has not been necessary to invoke the promotion order another time, for the Department has finally, after years of delay, developed promotion procedures for corporals and sergeants which have been conditionally approved by the court.

The Department, the United States, and McClellan meanwhile appealed to the Eleventh Circuit Court of Appeals from the district court's enforcement order.[6] The Eleventh Circuit affirmed the district court's order in all respects.

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[6] The intervenors also appealed from a later order in which the court conditionally approved a new selection procedure for promotion to corporal. That order, denominated "Paradise II" by the Eleventh Circuit, was also affirmed. A-45-54. Neither respondents nor petitioners seek review of that order.

The Eleventh Circuit gave short shrift to the appellants' contention that the district court's enforcement order constituted a modification of the 1979 and 1981 Decrees. Pointing out the "district court's fidelity to the detailed procedural mechanism established in the 1979 and 1981 Decrees," A-23-24, the court held that the district court's promotion order is a proper exercise of its enforcement responsibilities under the decrees, as those decrees are concerned with the impact of proposed promotion procedures "on blacks, and blacks alone," and expressly authorize plaintiffs to apply for an order enforcing their terms or for any other relief. A-22-27.

The court of appeals likewise rejected appellants' assertion that the enforcement order exceeds the district court's remedial authority under Section 706(g) of Title VII. A-28-35. Although appellants had argued that Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984), prohibits all affirmative equitable relief that benefits

persons not found to have been actual victims of discrimination, the court concluded that Stotts is "limited to its own facts." A-31. Specifically, it set forth four reasons why Stotts does not apply to this case: 1) the order here does not override a bona fide seniority system; 2) the case is replete with findings of pervasive intentional discrimination against blacks, which the consent decrees were designed to overcome; 3) Stotts was a Title VII case, while this case was brought under the Fourteenth Amendment; 4) the district court here was simply enforcing a consent decree while Stotts concerned the power of a court to modify a consent decree.

The court of appeals also rejected appellants' claim that the order violates the Fourteenth Amendment. Citing the "long history of discrimination [that] cannot be denied", A-39, the court held that the affirmative order is justified because it is designed to remedy the present effects of past discrimination. The court discussed several different standards

for judging the constitutionality of affirmative action, and concluded that the order is constitutional under any of the approaches. A-35-42. Finally, the court found that the relief is warranted under the dictates of United Steelworkers of America v. Weber, 443 U.S. 193 (1979), because it does not require the discharge, demotion, or replacement of any white troopers; is temporary; does not permit the promotion of any unqualified black troopers; and is specifically tailored to redress a manifest and chronic imbalance caused by the Department's conduct. A-42-45.

REASONS FOR GRANTING THE WRIT

The issue presented in this case is substantially similar to the questions already before this Court in Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir.), cert. granted sub. nom., Local 93, Int'l Assn. of Firefighters v. City of Cleveland, 54 U.S.L.W. 3223 (Oct. 7, 1985), and EEOC v. Local 638, ... Local 28 of Sheet Metal Workers, 753

F.2d 1172 (2d Cir. 1985), cert. granted sub. nom, Local 28 v. EEOC, 54 U.S.L.W. 3223 (October 7, 1985). These cases have been consolidated. While Local 93 and Local 28 also involve race-conscious relief, this case presents the issue in a context which is not yet before this Court: the enforcement of a consent decree in a case where there has been findings of intentional discrimination. Therefore, this Court should consolidate this case and consider it with Local 93 and Local 28.[7]

Like this case, Local 93 involves quota relief contained in a consent decree, but in Local 93 there have never been any findings of

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[7] Petitioners argue that this case should be held pending disposition of Local 93, and Local 28, as well as Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3692 (March 26, 1985). However, because the question of quota relief is presented in a different context in this case, even the United States acknowledges that the decisions in those cases may provide only "substantial clarification" of the issue here. To achieve a full resolution of the issue in the first instance, this case should be considered with Local 93 and Local 28.

intentional discrimination.[8] At issue in Local 28 is a contempt citation. This case involves the enforcement[9] of a consent decree voluntarily entered into by the parties, in light of a history of profound and pervasive discrimination. As such, it is typical of many consent judgments that have been agreed to in Title VII cases in order to eradicate legacies of discrimination.

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[8] Also, the consent decree in Local 93 was entered over the opposition of the union, an intervenor of right. Here there was no opposition to either the 1979 or 1981 decrees.

[9] There is no merit to petitioner's argument that the order "modified" the consent decrees. Apparently because the Eleventh Circuit decisively rejected previous arguments that the order constituted a "modification," (see page 18, supra), petitioners now suggest that the order was a modification because the one-for-one order "was greatly different, in kind and degree," from the relief contemplated by the consent decrees that "specific numbers of blacks would be promoted." Pet. 10. It is self-evident, however, that a one-for-one order is of the same ilk as an order requiring specific numbers of blacks to be promoted. Also, a one-for-one order is clearly encompassed within the "other relief" authorized by the consent decrees, especially in light of the fact that an identical order on hiring has been in effect for many years.

Only numerical race-conscious relief could remedy the discrimination here. Like the identical initial hiring order that the United States has always supported, the one-for-one promotion order was made necessary by the long history and current practices of an all-white organization excluding blacks from its upper ranks. The promotion order is additionally justified by the Department's repeated refusal to meet its obligations under its voluntary agreements embodied in the 1979 and 1981 decrees.

Although the facts of this case are egregious, we submit that they are an illustrative example of many situations in which consent decrees have been entered into against long histories of discrimination. Accordingly, full briefing and argument of this case will reveal most clearly to this Court why numerical race-conscious relief is permissible--is indeed sometimes necessary--to end employment discrimination in such all too common cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue and this case should be considered with Local 93 and Local 28.

Respectfully submitted.

DENNIS N. BALSKE
DEBORAH A. ELLIS
400 Washington Avenue
Montgomery, AL 36102
205/264-0286

ATTORNEYS FOR
RESPONDENTS

January 8, 1986